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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

TORINA A. COLLIS,

Petitioner,

v.

BANK OF AMERICA, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the reporting to a supervisor with authority to investigate and terminate, of personal bankers changing customer's bank accounts without their knowledge, causing them to incur fees of $20.00 a month, is protected activity under Sarbanes Oxley.

2. Whether Congress intended to protect whistleblowers for reporting fraudulent activities before the shareholders were defrauded, whereby, protecting whistleblowers for reporting fraudulent activities before it escalates to another Enron.

3. Whether a whistleblower needs to actually use the words "shareholder fraud" when reporting fraudulent activities or as the statute 1514A states, "reasonably believes constitutes a violation of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, **or** any provision of Federal law relating to fraud against shareholders," is sufficient.

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OPINION BELOW

The Fourth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter and appears at Appendix A. The District Court did not publish an opinion in this case. Its pertinent rulings from the bench are reprinted in Appendix B.

JURISDICTION

The Fourth Circuit filed its decision on January 26, 2010. An extension of time to file the petition for a writ of certiorari was granted to and including June 25, 2010 on May 18, 2010 in Application No. 09A1050. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISION INVOLVED

18 U.S.C. Section 1514A

SARBANES-OXLEY ACT OF 2002

(a) Whistleblower Protection for Employees of Publicly Traded Companies. – No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge,

demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee –

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by –

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation

of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

INTRODUCTION

Imagine, doing your job and discovering unethical, fraudulent activities affecting a large amount of people. You tell your supervisors, as you think would be the normal course of action. Imagine, then your own co-workers accusing you of inappropriate behavior and suddenly you are unemployed, your means to survive are stripped from you. You try desperately to prove you did not do what you were accused of. It's their word against yours. You are out numbered. Then suddenly, years later the truth comes to light. An accuser, your former boss, in her own sworn affidavit, forgot what her original story was (that is usually what happens when you do not tell the truth).

This is the case of an innocent, hard working woman, in her attempt to expose fraud, being out right stripped of her lively employment and looking to the judicial system to afford her redress and the protection that she so rightfully deserves. This case is unique as it affects citizens on a nationwide level. It could be your mother, father, sister, brother, minister, babysitter, husband, wife. These are real people. This case is about breaking and exposing the "code of silence" on corporate corruption. This is a case of principle and integrity and fighting for rights.

This country is in the shape it is in because people have given up hope and are afraid to fight for their rights as United States citizens. They are afraid of large corporations and the Government. For far too long citizens have been stripped of their rights, accused of things they did not do, and afforded no redress. Torina Collis will forever fight for principle. She will not sit back and allow corruption and deceit to flourish if she can help it. That is probably why she is left representing herself against the largest bank in the United States.

No one should have to endure the pain and humiliation that Torina Collis, Petitioner, has had to endure for reporting fraudulent activities in her work place and trying to put an end to corporate corruption and deceit. That is the very essence of the protection of the law. This case is likely to have a significant impact on a number of cases in the future. It is likely to affect a large majority of the U.S. population and Petitioner will show the importance of an issue on a national basis and it is imperative that the issue be resolved as quickly as possible. Crime, corruption, deceit. This case is about how quickly the public can begin to trust in the banking system and their money can be safe and secure. This case is about protecting whistleblowers who put their jobs and livelihood on the line to stand up to a large corporation and defend customers, shareholders, and all employees who have the absolute right to be protected under the law.

Petitioner was a role model employee who excelled in her role as a Sr. Personal Banker at Bank of America in Beltsville, Md. Petitioner received commendations on a regular basis from both customers and employees. One day this would come to a drastic halt. Petitioner began reporting fraudulent activities occurring at numerous branches of the bank. Respondents wrongfully terminated Petitioner for reporting fraudulent activities to a person with authority to terminate her. Petitioner was pleading with someone to assist her in stopping the fraudulent activities. Customers' accounts are being changed without their knowledge and they are incurring fees of $20.00 a month. Respondents back-dated a write up for February 22, 2005 and gave Petitioner that write up and another write up on the evening of February 24, 2005. Respondents terminated Petitioner over the phone on February 25, 2005. Petitioner filed a complaint with the Department of Labor OSHA under the Sarbanes-Oxley Act. Respondents told Department of Labor that Petitioner was written up on two separate days that week, therefore, she was terminated. Department of Labor dismissed the complaint. Years later Petitioner would prove, through court records, that Respondents gave false information to the U.S. Department of Labor Federal Investigators. Petitioner had no idea just how many years the fight would last, but she is determined to seek justice.

Petitioner still suffers today from the effects of Respondent's misconduct. She suffers the lost reputation and diminished employment opportunity that comes with being fired from a bank.

STATEMENT OF THE FACTS

Ms. Collis was employed at Bank of America as a personal banker from October 2000 until she was terminated on February 25, 2005.

In approximately December of 2003, Ms. Collis approached her supervisor Mr. Joy and notified him that customers accounts were being changed without their knowledge. Mr. Joy, employed with Bank of America at the time for over 20 years, told Ms. Collis "don't waste your breath, they (meaning corporate) know it's going on but they'd have to get rid of 90% of the bank to stop it." Again in June 2004, a customer came in and asked why she had a dollar deducted from her account and mailed to her in the form of a check. Online banking and bill pay was set up without the customer's knowledge. The customer also had an Advantage account set up without her knowledge. With Advantage, the customer must maintain $5,000 in the checking account to avoid a $20.00 monthly fee. The customer was irate.

Ms. Collis told Melody Vaughn, her then banking center manager that Jean Rene Tchoski had set up the accounts without the customer's knowledge. Ms. Vaughn promised to investigate. Ms. Vaughn would

later promote, with the help of the regional managers, Mr. Tchoski to a banking center manager of his own branch. This fraudulent activity was being repeated in other banking centers as well. Ms. Collis was reporting this activity up the chain. The activity was occurring in Maryland, District of Columbia and Virginia. Ms. Collis would later inform the newest member to the regional team, Mr. Scott Meehan. In November of 2004, Ms. Collis met with Mr. Meehan to inform him of the fraudulent activities and repeated harassment she was receiving. Mr. Meehan had just moved from North Carolina. Mr. Meehan promised Ms. Collis he would investigate and that it would take awhile. Up until that meeting, Ms. Collis received numerous commendations from employees and customers as well. Ms. Collis was a role model employee. (Appellants App. 126-145, Fourth Circuit Court of Appeals)

The harassment continued and Ms. Collis phoned Mr. Meehan to find out what was happening with the investigation. Mr. Meehan told Ms. Collis it was taking a while longer since she brought so much to his attention. In December 2004, Ms. Collis would report to Mr. Meehan that now Mr. Ricardo Grant, personal banker, pulled his own account information up on Ms. Collis' computer to give the appearance Ms. Collis was trying to look in his account. (Appellants App. 146-148) Ms. Vaughn told Ms. Collis to work at the front desk and log in. Ms. Vaughn would call Ms. Collis away from the front desk for a moment and upon return Ms. Collis noticed Mr. Grant had looked up his accounts on the computer she was

signed in on. Mr. Meehan stated in his affidavit, that in the fall and winter of 2004 and 2005 he spoke with Vaughn about Collis' rude behavior. This contradicts the letters Collis received from not only Ken Lewis, but other associates and Vaughn and Holloway themselves.

In January 2005, Ms. Collis received a letter from Mr. Ken Lewis, regarding the outstanding customer service she exuded with a customer who wrote the corporate office. (Appellants App. 149)

On approximately February 15, 2005, Ms. Vaughn approached Ms. Collis and accused her of falsifying her time sheets. Ms. Collis worked overtime weekly and would be the last person to ever falsify her time sheets. Ms. Vaughn did this in front of customers. On February 16, 2005, Ms. Collis asked Ms. Vaughn if she could leave early, instead of 6:30 pm, 5:30 pm, since she worked over an hour early on February 14. Ms. Vaughn said no. At 4:30 pm Ms. Vaughn told Ricardo Grant and Tara Gallman (personal bankers) to leave early. That was unusual for her to tell bankers to leave 45 minutes early. Ms. Collis thought since they were able to leave early, it would not be a problem for her to leave at 6:05 instead of 6:30. Collis had been struggling with pain due to her nerve disease which the bank was aware of.

On February 17, 2005, Ms. Collis told Mr. Meehan about Ms. Vaughn accusing her of falsifying her time sheets and had asked what was happening

with the investigation. Mr. Meehan said he was now waiting for Mr. Walter Frye, the New Account Executive for the Region from North Carolina, to get back to him. Ms. Collis told Mr. Meehan she would have to possibly take alternative measures and go to North Carolina to corporate and inform them because it was getting really bad. All the while customer's accounts were still being changed without their knowledge.

On February 23 and 24, 2005, Ms. Collis was being subjected to quite a bit of harassment by Lisha Thorne Holloway. For no reason, Ms. Holloway told Ms. Collis to get back to her office. Ms. Holloway told Ms. Collis that she was dismissed for the day. Ms. Collis was in shock and was in severe pain due to the mental abuse. The regional office was called and the administrator, Anita Horace, told Ms. Holloway to allow Ms. Collis to stay and work. Later at approximately 4:30 p.m., on February 24, Ms. Vaughn would come back from her 2 day conference in Baltimore, Md. and call Ms. Collis to her office to go over the events. Ms. Vaughn had a back-dated write up dated February 22, 2005 and Ms. Holloway had a write up dated February 24, 2005. Both were given to Ms. Collis at approximately 5:30 p.m. Ms. Collis did not sign because the allegations were false. Ms. Vaughn told Ms. Collis to just bring them in the next day signed.

Ms. Collis phoned North Carolina personnel department and lodged another formal complaint and told them about the back-dated write ups. Ms. Dina Rutherford told Ms. Collis it would take a while to

investigate. She said she needed to talk to Mr. Meehan. Ms. Rutherford said "Did Mr. Meehan know about the fraud?" Ms. Collis said "yes, I told him and he said he was investigating it."

Ms. Collis called out sick the next morning due to much physical pain and Mr. Meehan, Regional Sales manager, was there to terminate her. Ms. Vaughn gave Mr. Meehan the phone and Mr. Meehan told Ms. Collis "Torina, due to your write ups this week, you are terminated." Ms. Collis said, "What, Scott, you know I have been complaining to you and you know what they have done to me. You won't hear my side of the story?" Mr. Meehan would not listen to Ms. Collis' side of the story and told her "Now you can take whatever alternative measures you need to take."

Shocked and crying, Ms. Collis called personnel and they were shocked Mr. Meehan fired her. Ms. Rutherford told Ms. Collis after speaking with Mr. Meehan, he admitted she told him about the fraud, but said "that's not why I terminated her, I terminated her because she had inappropriate behavior". Ms. Rutherford finished her internal investigation April 2005. Mr. Meehan was gone from the bank in April 2005. In February 2008, Mr. Meehan was back at the bank and had signed an affidavit that Ms. Collis had inappropriate behavior. (Appellants App. 34) That affidavit was presented in a Summary Judgment Motion in the U.S. District Court in Greenbelt, Md.

Ms. Collis filed an action with the Department of Labor in May 2005 under the Sarbanes-Oxley Act of 2002 under the whistleblower protection.

Bank of America gave a statement to the Federal Investigators that Ms. Collis would have been terminated anyway as she was clearly written up on two separate occasions, February 22 and February 24, 2005. All the while knowing the statement was false. The Secretary of Labor dismissed Ms. Collis' complaint relying on that statement. Bank of America's counsel, Elena Marcuss of McGuire Woods, LLP, had Ms. Vaughn and Ms. Holloway sign affidavits in February of 2008 which stated that now Ms. Collis stormed out of the meeting on February 24, 2005 after being presented with the two write ups. (Appellants App. 37-41) (Appellants App. 193-195) Bank of America has not shown by clear and convincing evidence it would have terminated such an outstanding employee had she not blown the whistle. Tampering with evidence is clearly a sign of some sort of foul play.

Ms. Collis filed her action in the U.S. District Court in Greenbelt, Md. on May 26, 2006. (Appellants App. 10) Ms. Collis was deposed twice, once being pro se. (Appellants App. 65-106) (Appellants App. 159-183) She gave numerous incidents of the complaints she made about the fraudulent activities and stated it was not just in the Beltsville branch. The District Court of Maryland dismissed Ms. Collis' case on Summary Judgment suggesting that customer's accounts being changed without their knowledge is

them just "being unfairly treated." The fraud was taking place during Ms. Collis' employment and reporting of the activities and continues years later after her termination. (Appellants App. 239-244).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS – AND THE DISAGREEMENT BETWEEN SOME CIRCUITS AND CONGRESS – AS TO WHETHER THE SIGNIFICANCE BEHIND THE SARBANES-OXLEY ACT OF 2002 IS TO PROTECT WHISTLEBLOWERS WHO REPORT FRAUD BEFORE SHAREHOLDERS ARE AFFECTED, WHEREBY PROTECTING WHISTLEBLOWERS FOR HAVING A REASONABLE BELIEF A FEDERAL LAW IS BEING VIOLATED AND NOT NECESSARILY USING THE WORDS SHAREHOLDER FRAUD WHEN REPORTING THE FRAUDULENT ACTIVITIES.

Summary Judgment is appropriate where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56. The material facts are those identified by controlling law as essential elements of claims asserted by the parties. A genuine issue as to such facts exists if the evidence forecast is sufficient for a reasonable trier of fact to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477

U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Accordingly, such a motion should not be granted unless it appears "beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 46 (1957). In the instant case, there are genuine issues of material facts. Collis did not have inappropriate behavior and she did not falsify her time sheets.

In order to establish a prima facie case under Sarbanes-Oxley, an employee must prove that she (1) reasonably believed that her employer was breaking the law; (2) engaged in whistleblowing activity as defined by the statute; 3) suffered an adverse employment action; and (4) that there was a causal connection between the whistle blowing activity and the adverse employment action. Welch v. Cardinal Bankshares Corp., 2003-SOX-15 at 35 (ALJ 2004). Once an employee has met this burden, he is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected activity. Id. As the statutory language makes clear, the first element does not require the employee to prove that the employer actually violated the law. Welch, supra, at 36.

The primary objective of Sarbanes-Oxley is to reinforce confidence in the securities markets and catch fraud before shareholders are defrauded. Sarbanes-Oxley protects employees who in good faith

report or complain about corporate activities inconsistent with the interests of the company's shareholders.

Section 806 does not require whistleblowers to identify the statutory provisions they believe are being violated. "If Congress had intended to limit the protection of Sarbanes Oxley . . . or to have required complainants to specifically identify the code section they believe was being violated, it would have done so." Id.

A "good faith" standard is also entirely sensible. Given the complexities of the violations that employees may complain about an employee should not be required to have a professional's sophisticated understanding of the intricacies of federal securities and criminal law to be protected from retaliation.

A reasonable jury could conclude that Collis complained of fraudulent activities that affected a significant amount of customers, whereby would ultimately affect shareholders.

The bill makes it easier for an individual (or the Special Counsel on individual's behalf) to prove that a whistleblower reprisal has taken place. To establish a prima facie case, an individual must prove that the whistleblowing was a factor in the personnel action. This supersedes the existing requirement that the whistleblowing was a substantial, motivating or predominant factor in the personnel action. One of many possible ways to show that the whistleblowing was a factor in the personnel action is to show that

the official taking the action knew (or had constructive knowledge) of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action. The bill establishes an affirmative defense for an agency. Once the prima facie case has been established, corrective action would not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of the disclosure. Clear and convincing evidence is a higher standard of proof than the preponderance of the evidence standard now used. 135 **Congressional Record p. S2784 (1989).**

II. SECTION 301 OF THE SARBANES-OXLEY ACT

This section requires that every publicly traded corporation have an independent "audit committee" which "establish procedures for (A) the receipt, retention, **and treatment** of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; 15 U.S.C. § 78f(m), and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." It also requires that employee complaints be handled independently from the management of the publicly traded company in a professional and effective manner. Congress also provided that any company that fails to establish the procedures required by SOX Section 301 would be

"de-listed" as a publicly traded company from the stock exchanges.

It will not be sufficient for audit committees to simply refer complaints to company management or corporate counsel to investigate. Mr. Meehan's own affidavit stated he gave it to corporate security to investigate. Corporate Security was in the regional office of Bank of America in Greenbelt, Md. Outside technical experts should have been hired to evaluate the merits of Collis' complaint. There should be no conflict of interest. Fraud is an essential element of a Sarbanes-Oxley claim. Implicit in the concept of "fraud" is an element of intentional deception that would impact shareholders or investors. Wengender v. Robert Half Int'l, Inc., 2005-SOX-59, at 15 (ALJ Mar. 30, 2006). In Collis' case, customer's accounts are being changed without their knowledge (intentional deception) and incurring fees of $20.00/month. The illegal revenue generated is being reported to shareholders (that would impact shareholders).

In Allen v. Administrative Review Board, No. 06-60849, A (DOL) ALJ found no merit to the complaints and the appeals court agreed, dismissing the claims. The court said that one of the employees, who was an accountant, should have known the errors she alleged did not violate federal securities laws. In Allen v. Stewart Enterprises, Inc., the ALJ found the "concerns about possible violations of state laws which could result in sanctions and revocation of respondent's state license" not protected activity because Section 806 only provides protection for reporting

violations of the enumerated fraud provisions, and the ARB affirmed. 2004-SOX-60, 61 & 62 (ALJ Feb. 15, 2005).

The Allen court held: "Importantly, an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories is protected." The Allen Court, however, has held that while the objective reasonableness of an employee's belief can be decided as a matter of law in some cases, "the objective reasonableness of an employee's belief cannot be decided as a matter of law if there is a genuine issue of material fact. . . . (and if) reasonable minds could disagree on this issue, the objective reasonableness of an employee's belief should not be decided as a matter of law." Allen v. Administrative Review Board, 514 F.3d 468 (5th Cir. 2008). The Fourth Circuit has specified that the objective reasonableness inquiry is a mixed question of law and fact which can be decided as a matter of law in particular cases, and that it would be error to hold that it is always decided as a matter of law. Welch v. Chao, 536 F.3d 269, at 278 n.4 (4th Cir. 2008).

In Collis' case, Bank of America did not attempt to correct it, and is concealing it, and therefore is inapposite and Collis had a reasonable belief that Bank of America engaged in conduct that constitutes a violation of one of the six enumerated categories.

In Frederickson v. Home Depot U.S.A., Inc., 2007-SOX-13 (ALJ July 10, 2007), complainant

claimed that respondent had a policy of recording items as damaged instead of for "store use" in order to defraud vendors out of refunds. The complainant had not engaged in protected activity because he did not have a reasonable basis to believe that the policy extended beyond the store he worked in or that the policy was of a magnitude sufficient to support a reasonable belief that a reasonable investor would rely upon such information, according to the ALJ.

In Taylor v. Wells Fargo, Texas, 2004-SOX-43 (ALJ Feb. 14, 2005), aff'd ARB 05-062 (ARB June 28, 2007), an ALJ found that complainant reasonably believed backdating the letters of credit constituted falsifying a bank document, which she believed "would constitute an illegal and criminal act." Respondent argued there was no specific evidence it was committing fraud, the ALJ noted that an actual violation of the law is not required. On appeal, both the ALJ and the ARB found that complainant did not prove other elements of her prima facie case relating to causality, and the Fifth Circuit approved of those determinations upon its review. Taylor v. Admin. Rev. Bd., 288 Fed. Appx. 929 (5th Cir. 2008).

In Livingston v. Wyeth July 28, 2006 U.S. D.C. N.C. (4th Cir.), his colleagues and subordinates complained to the Human Resources Director that Livingston was a poor leader, was often unavailable or absent, routinely lost his temper, was argumentative and unstable, had an inability to relate to his colleagues and regularly abused his subordinates. Based on Livingston's own testimony, no reasonable

trier of fact could disagree that Livingston would have been discharged for his insubordination at the holiday party, irrespective of his alleged protective activity.

On May 13, 2002, Wyeth issued Livingston a written warning for use of "foul and abusive behavior" toward subordinates. The written warning stated that "further difficulties in this area will result in further discipline up to and including termination." (Id.) Shortly thereafter, on or about May 15, 2002, Livingston sent identical e-mail apologies to eight Wyeth employees regarding his "inappropriate language," "salty remarks," "intense debating style," and behavior "which may have caused (them) personal pain and discomfort."

"Moreover, even if there were protected activity, Defendants have pointed to clear and convincing evidence that Livingston would have been terminated for insubordination unrelated to the protected activity."

In Livingston v. Wyeth, Inc. No. 06-1939, 2008 WL 756068 (4th Cir. March 24, 2008), Livingston alleged that Wyeth violated Section 1514A by terminating his employment in retaliation for expressing concerns about training. This case is inapposite to Collis', as training deficiencies is entirely different than defrauding customers of their money at a bank and ultimately, at the core, affect shareholders. Furthermore, Livingston does not dispute his behavior as Collis is disputing the allegations that she had inappropriate behavior.

The Fourth Circuit found that, even if Wyeth made any of the allegedly false statements, none would be "material." Under Supreme Court authority, for information to be material, there must be a "substantial likelihood that a reasonable shareholder would consider (the matter) important to his decision to invest." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976)

In Livingston v. Wyeth, Inc., (M.D. N.C. July 28, 2006), (4th Cir. 2008) the court found that "[t]o be protected under Sarbanes-Oxley, an employee's disclosures must be related to illegal activity that, at its core, involves shareholder fraud". O'Mahoney v. Accenture Ltd., 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008) (noting that "[Section 806] clearly protects an employee against retaliation based upon the whistleblower's reporting of fraud under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud").

In Reyna v. Conagra Foods, Inc., 506 F. Supp. 2d 1363 (M.D. Ga. June 11, 2007), parties debated whether reports of mail and wire fraud were protected activity regardless of whether that fraud relates to fraud against shareholders. In reading the plain meaning of the statute, the court in Reyna concluded that "[t]he statute protects an employee against retaliation based upon that employee's reporting of mail fraud regardless of whether that fraud involves a shareholder of the company."

In Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365 (N.D. Ga. 2004), the district court denied defendants' motion for summary judgment because it found a genuine issue of material fact existed whether the plaintiff had engaged in protected activity. The plaintiff contended that these disclosures were protected because they alleged attempts to circumvent the company's system of internal accounting controls and therefore stated a violation of Section 13 of the Exchange Act, 15 U.S.C. § 78m(b) ("no person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls"). The court rejected the company's assertion that the complaints were too vague to constitute protected activity, noting that the company had taken the allegations seriously and investigated the claims. Moreover, although the court agreed that "the connection of Plaintiff's complaints to the substantive law protected in Sarbanes-Oxley [wa]s less than direct," it found that "the mere fact that the severity or specificity of her complaints does not rise to the level of action that would spur Congress to draft legislation does not mean that the legislation it did draft was not meant to protect her." 334 F. Supp. 2d at 1377.

In Reddy v. MedQuist, Inc., 2004-SOX-35, at 3 (ALJ June 10, 2004), the ALJ dismissed a SOX whistleblower retaliation claim because the complainant's communications to management "concerned internal company policy as opposed to actual violations of federal law." The ARB affirmed the ALJ's decision on appeal, ruling that the complainant's communications

failed to "provide information (about conduct) she reasonably believed constituted violations of the federal fraud statutes, or an SEC rule or regulation, or any federal law pertaining to shareholder fraud." Reddy v. MedQuist, Inc., ARB Case No. 04-123, at 7 (Sept. 30, 2005).

In Johnson v. Stein Mart, Inc., No. 3:06-cv-00341 (M.D.Fla. June 20, 2007) the Employee Plaintiff had been hired as a Buyer at the Defendant's corporate headquarters, and was later promoted to be a Planner. While there she complained to management about (1) the collection of markdown allowances from vendors, (2) the changing of season codes on older inventory, and (3) the accounting for the value of inventory.

The Defendant argued that the Plaintiff failed to establish a prima facie case on the element of protected activity because she did not have a reasonable belief that these practices were illegal because she had no accounting background and had no knowledge of the Defendant's accounting practices. The district court rejected Defendant Stein Mart's argument because the Defendant had treated the Plaintiff's complaints as reasonable enough to have warranted an internal investigation.

On February 7, 2008, Judge Marrero held in O'Mahoney v. Accenture Ltd., 2008 WL 344710 5th Cir. (S.D.N.Y 2008) that SOX "contains six provisions that enumerate six specific forms of misconduct which, if reported by an employee, protect the whistleblower

from employer retaliation: (1) § 1341 (mail fraud); (2) § 1343 (wire fraud); (3) 18 U.S.C. § 1344 (bank fraud); (4) 18 U.S.C. § 1348 (securities fraud); (5) any rule or regulation of the SEC; **or** (6) any provision of federal law relating to fraud against shareholders." Judge Marrero rejected the employer's contention that the phrase "related to fraud against shareholders" modifies each of the preceding phrases.

In Welch v. Cardinal Bankshares Corp, ARB Case 05-064 (ARB, May 31, 2007) his court commented that its ruling "does not suggest that a whistleblower must identify specific statutory provisions or regulations when complaining of conduct to an employer, nor do we address the burden upon the parties in the proceedings before the ALJ."

Congress passed Sarbanes-Oxley to combat financial crimes and fraud committed by corporate insiders.

Senator Patrick Leahy, the principle sponsor of the whistleblower law, explained its meaning on the floor of the Senate:

> We included meaningful protections for corporate whistleblowers, as passed by the Senate. We learned from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court. Enron wanted to silence her as a whistleblower because Texas law would allow them to do it. Look what they (Enron) were doing on this chart. There is no way we could have known

> about this without that kind of a whistleblower . . . The provisions Senator Grassley and I worked out in Judiciary Committee make sure whistleblowers are protected.

See 148 Congressional Record, p. S7358 (July 25, 2002).

DOL Judge Stuart A. Levin rejected a corporate request to dismiss a SOX whistleblower case on a narrow technicality by referencing the legislative history that gave rise to the corporate reform law:

> Shortly before, and contemporaneous with, its enactment, accounting scandal in some circles were causing painful economic dislocations among investors, lenders, and employees of several major firms and undermining investor confidence in the integrity of financial markets. Finding the status quo unacceptable, Congress set about to refashion the regulatory and private sector environments which had failed to detect or affirmatively allowed deception in reporting of corporate value and performance and permitted the types of shenanigans which brought several large concerns down in ruins and rocked others to their very foundations. To prevent the recurrence of such chicanery in the future, Congress examined the ethical standards and accounting and reporting systems flaws and failures which, in some instances, allowed fraud to flourish. Intent upon reforming the regulatory and private sector environments which allowed the fleecing to take place, Congress was determined

> to reassure the markets that effective preventive and exposure measures could be formulated, and it turned, among other remedies, to a valuable deterrent resource it had used in the past to help insure compliance with its mandates: employees within an organization who were willing to blow the whistle. Congress has long employed the inside whistleblower as a first line defense against various types of abuses which it deems unacceptable. Moreover, it understands the risks it beckons the whistleblower to accept, and it endeavors to protect them. Under such circumstances, it does not serve the purpose or policies of the act to take too pinched a view of the remedial statute when it comes to protecting those in an organization who can address the concerns Congress sought to correct.

See Morefield v. Exelon Services, Inc., 2004-SOX-2, D&O of ALJ, p. 2 (January 28, 2004) citing Representative Bentsen, 148 Cong. Rec. H5462-02, at *H5467.

> This bill would create a new provision protecting employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent.

(Senate report No. 107-146, p. 19 (2002)).

Under established case law, the DOL prohibits employers from discharging employees even if they only suspect that the employee engaged in protected conduct.

Smith v. ESICORP, Inc., 93-ERA-16, D&O of Remand by SOL, at 9-11 (March 13, 1996) (discussing circumstances behind management suspicion that employee engaged in protected activity).

Congress looked toward whistleblowers. They were not only concerned about corrupt accounting practices that harmed innocent investors, but also a "culture of silence" that allowed unethical corporate misconduct to go unreported and allowed illegal conduct to remain undetected. Employees are in a position to learn about unethical or illegal practices. An investor will naturally be nervous and probably sell his stock if he knew the company he invested in is defrauding customers and not accurately reporting revenue. Collis believes Congress intended to protect such a whistleblower as herself who was and still is concerned about hard working citizens of this country being out right defrauded of their hard earned money from underneath their nose and at its core defrauds shareholders.

Whistleblowers are frequently "the only firsthand witnesses to the (activity). They are the only people who can testify as to 'who knew what, and when. . . .'" Senate Report No. 107-146, at 10 (2002)

This process requires "careful evaluation of all evidence pertinent to the mind-set of the employer

and its agents regarding the protected activity and the adverse action taken." Timmons v. Mattingly Testing Services, 95-ERA-40, D&O of Remand by ARB, at 10 June 21, 1996.

Congressional Record p. S7420 states:

> Section 806 of the Act would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company. Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors. With an unprecedented portion of the American public investing in these companies and depending upon their honesty, this distinction does not serve the public good.
>
> In addition, corporate employees who report fraud are subject to the patchwork and vagaries of current state laws, even though most publicly traded companies do business nationwide. Thus, a whistleblowing employee in one state (e.g., Texas, see supra) may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions. Unfortunately, companies with a corporate culture that punishes whistleblowers for being "disloyal" and "litigation risks" often transcend state lines, and most

corporate employers, with help from their lawyers, know exactly what they can do to a whistleblowing employee under the law.

U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies. The Act is supported by groups such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, all of whom have written a letter placed in the Committee record calling this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."

This provision would create a new provision protecting employees when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, their supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping actions which they reasonably believe to be fraudulent. Since the only acts protected are "lawful" ones, the provision would not protect illegal actions, such as the improper public disclosure of trade secret information. In addition, a reasonableness test is also provided under the subsection (a)(1), which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts (See generally Passaic Valley Sewerage Commissioners v. Department of Labor, 992 F. 2d

> 474, 478). Certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief. The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence.

Congressional Record S7420.

III. MOTIONS HEARING ON SUMMARY JUDGMENT

During the Motion for summary judgment hearing on August 13, 2008, the District Court recited the case from both the perspective of the Plaintiff and Defendant. (Appellants App. 210-224). The District Court as well as the U.S. Court of Appeals for the Fourth Circuit heavily rely on Livingston v. Wyeth, Inc. In Livingston, that case is regarding deficient training activities. In addition, Livingston admits he had rude behavior and would have been terminated anyway. Livingston is inapposite to this case as Ms. Collis did not have inappropriate behavior. The Circuits are split as to whether an employee must state shareholder fraud. In the Collis case, there is at the core shareholder fraud. If shareholders were aware there was fraud taking place, they would surely want answers. If a class action occurs for

customers to get their money back, that would ultimately affect shareholders. It seems only logical you would want stop the fraud before the shareholders are affected. I am certain Congress intended to protect a whistleblower such as myself. Usually the only way to detect fraud is within the company. This case is of national significance and importance. It affects a large segment of the population. The amount of money being taken from customers accounts could be in the hundreds of thousands or even millions. This important issue needs to be resolved and should be done by the U.S. Supreme Court.

CONCLUSION

Collis needs her day in court. This Country needs Collis' day in court. No one at the bank listened to her complaints and took them seriously as required by the law and took any measures to correct the fraud. The bank needs to be put in a position where they will have to answer in court once and for all and start to not only take whistleblower complaints seriously, but take this whistleblower's complaints seriously.

The Court should grant the petition for a writ of certiorari and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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(240) 508-5492

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Torina A. Collis,

Plaintiff-Appellant,

v.

No. 08-2058

Bank of America,
National Association,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland,
At Greenbelt.
Peter J. Messitte, Senior District Judge.
(8:06-cv-01346-PJM)

Submitted: January 19, 2010
Decided: January 26, 2010

Before NIEMEYER, KING, and DAVIS, Circuit Judges

Affirmed by unpublished per curiam opinion.

COUNSEL

Torina A. Collis, Appellant Pro Se, Waldorf, Maryland. Elena D. Marcuss, McGuireWoods, LLP, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c)

OPINION

PER CURIAM.

Torina A. Collis filed a civil action alleging she was terminated in violation of the whistleblower provisions of the Sarbanes-Oxley Act, 18 U.S.C.A. 1514A (West Supp. 2009). Collis appeals the district court's order granting summary summary judgment, for reasons stated from the bench, in favor of the Defendant. Accordingly, we affirm. *See Livingston v. Wyeth, Inc.*, 520 F.3d 344, 351 (4the Cir. 2008) (discussing elements needed to establish a retaliation claim under the Act). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Torina A. Collis	*	
	*	
Plaintiff	*	Civil No. PJM-06-1346
v.	*	
	*	
Bank of America, N.A.,	*	
	*	
Defendant	*	

FINAL ORDER OF JUDGMENT

The Court having considered Defendant's Motion for Summary Judgment [Paper No. 35], it is, for the reasons stated on the record in open Court, this 13th day of August, 2008,

ORDERED

1. Defendant's Motion for Summary Judgment [Paper No. 35] Is **GRANTED**;
2. Final Judgment is granted in favor of Defendant and against Plaintiff on her claim for violation of the Sarbanes-Oxley Act; and
3. The Clerk of the Court shall **CLOSE** the case.

/s/

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MARYLAND

TORINA A. COLLIS,

Plaintiff,

v. **Civil Action: PJM-06-1346**

BANK OF AMERICA,

Defendant.

Wednesday, August 13, 2008
Greenbelt, Maryland

The above-entitled action came on for Motions Hearing proceedings Before the HONORABLE PETER J. MESSITTE, United States District Court Judge, in courtroom 4C at 2:03 p.m.

APPEARANCES:

On behalf of the Plaintiff:

MORRIS E. FISCHER, Esquire

On behalf of the Defendant:

ELENA D. MARCUSS, Esquire

Tracy Rae Dunlap, RPR, CRR **(301) 344-3912**
Official Court Reporter

The court agrees with the defendant in this case That the allegations are not of the sort of protected Activity that Sarbanes-Oxley is intended to address. This is not an allegation

that's ultimately related to Shareholder fraud. It's really an allegation that some Customers are being unfairly treated in one fashion or Another.

There is no indication this that there would Have been any obligation in these even four, five or Six instances, if there were that many, that the Plaintiff knew about; and it's not clear that she knew About that many, that that would have been the kind of Matter that would have to be reported to the Shareholders by anybody, and that in any case, whether The fact that what could have been some rogue activity By a few employees in a mulitmillion-dollar operation Would in any way be material to their decision to Invest in the company.

So whatever went on here, good, bad or Indifferent, the court agrees that as a matter of law, It establishes no violation under Sarbanes-Oxley. And Without visiting the issues of contributing factor and So on and so forth to her dismissal, the court grants The motion for summary judgment with regard to 06-1346, Paper Number 35.

CERTIFICATE

I, Tracy Rae Dunlap, RPR, CRR, an Official Court Reporter for the United States District Court of Maryland, do hereby certify that I reported, by machine Shorthand, in my official

capacity, the proceedings Adduced during the Motions Hearing proceedings in the Case of TORINA A. COLLIS versus BANK OF AMERICA,Civil Action Number PJM-06-1346, on August 13, 2008.

I further certify that the foregoing 26 pages Constitute the official transcript of said proceedings, As taken from my machine shorthand notes, of said Proceedings.

In witness whereof, I have hereto subscribed my Name, this 8th day of January 2009.

/s
Tracy Rae Dunlap, RPR, CRR
Official Court Reporter